

DEC 19 2003

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON
U.S. COURT OF APPEALS**

YUE HUA CHEN,

Petitioner,

v.

JOHN ASHCROFT, ATTORNEY
GENERAL,

Respondent.

No. 02-73187

Agency No. A73-798-915

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted November 6, 2003
Honolulu, Hawaii

Before: REINHARDT, THOMAS, and CLIFTON, Circuit Judges.

Yue Hua Chen, a native and citizen of China, petitions for review of the Board of Immigration Appeals' ("BIA") affirmance of an immigration judge's ("IJ") denial of her application for asylum and withholding of removal. We have jurisdiction under 8 U.S.C. § 1252, and we grant the petition for review.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Where, as here, the BIA conducts a *de novo* review of the IJ's decision, our review is limited to the BIA's decision. *Singh v. Ashcroft*, 301 F.3d 1109, 1111 (9th Cir. 2002). Here, the BIA conducted a *de novo* review, citing to portions of the record not referred to by the IJ, providing reasons to find Chen not credible that were not cited by the IJ, explicitly affirming the IJ's decision with respect to voluntary departure, neglecting to mention other aspects of the IJ's decision, and concluding with the following statement, "Therefore, because we are in agreement with the decision of the Immigration Judge, and because we are not persuaded by any of the respondent's arguments on appeal, we affirm that decision based upon and for the reasons indicated therein." Use of the word "therefore" indicates that affirmance relies on the reasons articulated in the *de novo* review just conducted. While the language "based upon and for the reasons indicated therein" often indicates adoption of an IJ's decision, that language must be read in context. Here, it does not indicate that the BIA adopted the IJ's reasons as its own.

We will deny the petition for review if the BIA's determination is supported by substantial evidence. *Id.* Although we review credibility findings under the deferential substantial evidence standard, in order to make an adverse credibility finding, "[t]he BIA must have a legitimate articulable basis to question the petitioner's credibility, and must offer a specific, cogent reason for any stated

disbelief." *Valderrama v. INS*, 260 F.3d 1083, 1085 (9th Cir.2001) (per curiam) (internal quotation marks and citation omitted). The discrepancies must go to the heart of the asylum claim. *Id.* We must reverse “an adverse credibility determination that is based on ‘speculation and conjecture’ and is not supported by evidence in the record.” *Salaam v. INS*, 229 F.3d 1234, 1238 (9th Cir. 2000) (citing *Akinmade v. INS*, 196 F.3d 951, 957 (9th Cir. 1999)). The reasons given by the BIA in this case are all inadequate to support an adverse credibility finding because they are either based on clear misreadings of the record or impermissible speculation and conjecture. *See Bandari v. INS*, 227 F.3d 1160, 1167 (9th Cir. 2000).

The BIA gave four reasons for disbelieving Chen. The first reason it gave for its adverse credibility determination was that Chen allegedly did not know the denomination of her uncle’s church group, but testified that her church group was like her uncle’s. The government conceded at oral argument that this was incorrect and based on a misreading of the record. Chen never testified that her religious group was like her uncle’s.

The second reason given by the BIA for rejecting Chen’s testimony is an alleged inconsistency in her testimony that she did not attend church in Saipan because she did not know anyone with whom to attend church, but that she saw a

friend in Saipan. However, it is not inconsistent to see a friend in Saipan, yet still not know anybody with whom to attend church. The transcript of Chen's testimony at the hearing before the IJ reveals that the acquaintance in Saipan was not a very close friend, and the IJ did not inquire whether the friend was of the same religious affiliation.

The third reason given by the BIA for finding Chen incredible was the alleged inconsistency in fleeing China to worship as she chose, but not forming ties to religious groups in Saipan or Guam. However, there is no inconsistency between fleeing a country because one is persecuted or fears persecution due to one's religious practice and not practicing devoutly after leaving. Many petitioners flee their country because of political persecution without presenting any evidence that they have sought out international branches of their former political party upon arriving in America. And yet, we would not find this inconsistent or incredible. There is no reason to view religion differently.

Chen never testified to being very devout. She testified to attending a private church a few times, being arrested and sentenced to a year of prison when she was caught, and being exempted from serving that sentence because she was nursing a child. Because the BIA found her not credible, it never determined whether this testimony established either past persecution, whether it established a

well-founded fear of future persecution, whether any such persecution was based on religion, or whether on imputed religious practice. But Chen's level of religious devotion simply cannot sustain a finding that she is not believable.

Moreover, when asked why she did not attend church in Saipan, Chen testified that she did not know anyone with whom to go to church, she didn't know English, and was afraid of being spotted by immigration officials. The BIA's finding that this was "inconsistent" was not based on any record evidence, but rather pure conjecture that was not reasonably related to the record evidence. It is completely plausible that a religious refugee might decide not to attend a worship service conducted in a foreign language at a church where the applicant did not know anyone in a country where she feared contact with immigration officials. Chen was never questioned about her infrequent church attendance in Guam. Because her infrequent church attendance is not per se inconsistent with her asylum claim, she cannot be faulted for failing to volunteer an explanation.

The final reason given by the BIA for rejecting Chen's testimony was an alleged inconsistency as to the number of Chen's children, and an alleged delay in bringing the fact that she had a second child to the attention of the IJ. However, this conclusion is based on a combined misreading of the record and impermissible speculation. Chen did not wait until the end of her hearing to

mention her second child. Chen told the asylum officer who interviewed her about the second child, and that child was handwritten onto her application. She also told the IJ about the second child at an earlier hearing. Her narrative referenced the second child repeatedly, as she explained that she was excused from serving a one year prison sentence because she was nursing that child. Chen provided a reason for not initially mentioning the child on her asylum application: After she left China, her husband gave the child away to a childless couple. The BIA cited this explanation, but failed to provide any reason why it was inadequate. One who gives up a child for adoption cannot be faulted for not continuing to refer to the child as one's own. Thus, there is no unexplained delay in mentioning the second child that can support an adverse credibility finding. What Chen did fail to mention until the end of her hearing was that she had gone into hiding during her second pregnancy for fear of undergoing a forced abortion and that she was fined for having the second child. However, these facts had nothing to do with Chen's claim of religious persecution, and she did not attempt to claim persecution based on resistance to China's population control policy. In fact, her lawyer reiterated at the end of the hearing that she was not making such a claim. Thus, any delay in mentioning these facts cannot support an adverse credibility finding.

In sum, the BIA's adverse credibility finding is not supported by specific, cogent reasons which are substantial and bear a legitimate nexus to the finding. *Garrovillas v. INS*, 156 F.3d 1010, 1043 (9th Cir. 1998). No remand is necessary for a further investigation of Chen's credibility. *See He v. Ashcroft*, 328 F.3d 593, 604 (9th Cir. 2003) ("The INS, having lost this appeal, should not have repeated opportunities to show that Mr. He is not credible any more than Mr. He, had he lost, should have an opportunity for remand and further proceedings to establish his credibility."). We remand, however, for determination of the remaining issues relating to eligibility for asylum and withholding of removal. *INS v. Ventura*, 537 U.S. 12, 16-17 (2002).

PETITION FOR REVIEW GRANTED; REMANDED.